

Internal Revenue Service

Number: **200934036**
Release Date: 8/21/2009

Index Number: 2632.03-00, 2652.00-00,
9100.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-148837-08

Date:
April 29, 2009

Date of Death:

Decedent	=
Date 1	=
Spouse	=
Child A	=
Child B	=
Grandchild 1	=
Grandchild 2	=
Grandchild 3	=
Grandchild 4	=
Grandchild 5	=
Grandchild 6	=
Grandchild 7	=
Child C	=
Revocable Trust	=
Marital Trust	=
Family Trust	=
a	=
b	=
Attorney	=
c	=
d	=
e	=
Date 2	=
f	=

Dear :

This responds to the letter dated November 12, 2008, from your representative requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make an election to treat a marital trust as two separate trusts under § 26.2652-2(c) of the Generation-Skipping Transfer Tax Regulations and requesting a ruling on the application of the GST tax allocation rules under § 2632(c)(1) of the Internal Revenue Code, as in effect for the year in issue.

The facts and representations submitted are summarized as follows. Decedent died on Date 1. Date 1 is a date that is prior to December 27, 1995. Decedent was survived by Spouse, Child A, Child B, Grandchild 1, Grandchild 2, Grandchild 3, Grandchild 4, Grandchild 5, Grandchild 6, and Grandchild 7. Child C predeceased Decedent, but was survived by Grandchild 4 and Grandchild 5.

During his lifetime, Decedent created Revocable Trust, which became irrevocable on the date of his death.

Article 3 of Revocable Trust provides for the creation of Marital Trust, a qualified terminal interest property (QTIP) trust, upon Decedent's death. Article 3 further provides that upon the death of Spouse, the assets of Marital Trust are distributed to Family Trust, unless Spouse exercises her limited testamentary power to appoint the income and principal of Marital Trust to or among Decedent's descendants, spouses of Decedent's descendants, or certain charitable organizations.

Article 4 of Revocable Trust provides for the creation of Family Trust upon Decedent's death. The distribution provisions of Article 4 are summarized as follows. The trustee, in the trustee's discretion, shall pay the income of the Family Trust at least quarterly to Spouse and/or to Decedent's descendants, in equal or unequal proportions, in relation to their respective needs and best interests. The trustee may distribute principal to Spouse and to any child of Decedent that may be dependent on Spouse as the trustee deems advisable, subject to an ascertainable standard. Upon the death of Spouse, the trustee shall distribute the assets of Family Trust, including the assets of Marital Trust added thereto, as follows: three-eighths to Child A, if she survives Decedent; one-eighth to each of Child B and Grandchild 1, if they survive Decedent; and, one-sixteenth to each of Grandchild 2, Grandchild 3, Grandchild 4, Grandchild 5, Grandchild 6, and Grandchild 7, if they survive Decedent. If any of the distributions fail for lack of a surviving taker, the distribution shall be distributed pro rata to the remaining distributees who survive Decedent.

Under Decedent's will, after the devise of Decedent's personal property to Spouse, all the residue of Decedent's estate was devised to the trustee of Revocable Trust. The Marital Trust was funded with \$a and the Family Trust was funded with \$b.

The executor of Decedent's estate retained Attorney to prepare the estate's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. Attorney represented that he was fully knowledgeable and experienced with respect to estate tax returns and generation-skipping transfer tax issues.

The Form 706 was timely filed. On Schedule M of Form 706, the executor elected to treat the assets of Marital Trust as qualified terminable interest property (QTIP) under § 2056(b)(7) of the Code. On Schedule R of Form 706, the executor made a special election under § 2652(a)(3) to treat the assets of Marital Trust, for GST tax purposes, as if the election under § 2056(b)(7) had not been made (a "reverse" QTIP election).

In preparing Schedule R for Decedent's estate, Attorney mistakenly believed that GST tax could be avoided by allocating Decedent's GST exemption to the trusts based on the amount of trust assets that would ultimately be distributed to skip persons. Accordingly, the amounts of Decedent's GST exemption affirmatively allocated by the executor to Marital Trust (\$c) and Family Trust (\$d) on Schedule R were insufficient to result in an inclusion ratio of zero for either trust. Approximately \$e of Decedent's GST exemption remained unallocated after the filing of the Form 706.

Subsequent to the filing of Decedent's Form 706, § 26.2652-2(c) of the Generation-Skipping Transfer Tax Regulations was issued. This regulation provides a transitional rule that allows certain trusts subject to a reverse QTIP election, to which GST tax exemption had been affirmatively allocated, to be treated as two separate trusts. As a result of this rule, only a portion of the trust would be treated as subject to the reverse QTIP election and that portion would be treated as having a zero inclusion ratio. The deadline for making the election set forth in the transitional rule was June 24, 1996.

Attorney failed to advise the executor or the trustee of Marital Trust to split the Marital Trust into a GST exempt and GST nonexempt Marital Trust and failed to advise the executor of the election provided in § 26.2652-2(c).

Spouse died on Date 2, at which point the failure to split Marital Trust was discovered.

The executor of Decedent's estate has requested the following rulings:

1. The estate is granted an extension of time to elect to treat Marital Trust as two separate trusts pursuant to the terms of Revocable Trust and § 26.2652-2(c) such that one trust has an inclusion ratio of zero due to the previous allocation of Decedent's GST exemption to Marital Trust, and the other trust has an inclusion ratio of one for GST tax purposes. The reverse QTIP election would be treated as applying only to the trust with the zero inclusion ratio.
2. The automatic allocation rules for allocating a decedent's GST exemption under § 2632(c)(1) (as in effect for the year in issue) apply to Family Trust, such that \$f of

Decedent's GST exemption was deemed allocated to Family Trust, with the result that the trust has an inclusion ratio of zero under § 2642

Law and Analysis

Section 2601 imposes a tax on every GST. A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate.

Section 2641(a) defines "applicable rate" as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer. Under § 2642(a)(1), the "inclusion ratio" with respect to any property transferred in a generation-skipping transfer from a trust, is the excess of 1 (one) over the applicable fraction determined for the trust. Under § 2642(a)(2), the "applicable fraction" is a fraction, the numerator of which is the amount of GST exemption allocated to the trust, and the denominator of which is generally the value of the property transferred to the trust.

Section 2631(a), as in effect for the year in issue, provided that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed.

Sections 2632(c)(1)(A) and (B) (as in effect for the year in issue) provide that any portion of an individual's GST exemption which has not been allocated within the time prescribed in § 2632(a) shall be deemed to be allocated first, to property which is the subject of a direct skip occurring at the individual's death, and second, to trusts with respect to which the individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after the individual's death.

Section 2632(c)(2)(A) (as in effect for the year in issue) provides that an allocation under § 2632(c)(1) is to be made among the properties described in § 2632(c)(1)(A) and the trusts described in § 2632(c)(1)(B), as the case may be, in proportion to the respective amounts (at the time of allocation) of the nonexempt portions of such properties or trusts.

Section 26.2632-1(d)(1) provides that an allocation of a decedent's unused GST

exemption by the executor of the decedent's estate is to be made on the appropriate United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) filed on or before the date prescribed for filing the return (including extensions).

Section 26.2632-1(d)(2) provides that a decedent's unused GST exemption is automatically allocated on the due date for filing Form 706 to the extent the GST exemption is not otherwise allocated by the decedent's executor on or before that date. The automatic allocation occurs whether or not a return is actually required to be filed. Unused GST exemption is allocated pro rata, first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata to trusts with respect to which a taxable termination may occur, or from which a taxable distribution may be made. The automatic allocation of GST exemption is irrevocable and any allocation made by the executor after the automatic allocation is made is ineffective. No automatic allocation of GST exemption is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any generation skipping transfer with respect to the trust.

Section 2642(b)(2)(B) provides that any allocation of GST exemption to property transferred as a result of the death of the transferor is effective on and after the date of death of the transferor.

Section 2652(a)(1) defines "transferor" to mean (A) in the case of any property subject to the tax imposed by chapter 11, the decedent, and (B) in the case of any property subject to the tax imposed by chapter 12, the donor.

Section 2652(a)(3) provides that, with respect to any trust for which a deduction is allowed under § 2056(b)(7) (regarding qualified terminable interest property), the estate of the decedent may elect to treat all of the property in such trust for purposes of the GST tax provisions as if the QTIP election had not been made. This election is referred to as the "reverse" QTIP election. The consequence of a reverse QTIP election is that the decedent remains, for GST tax purposes, the transferor of the QTIP trust for which the election is made. As a result, the decedent's GST tax exemption may be allocated to that QTIP trust.

Section 26.2652-2(a) provides that a reverse QTIP election is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies.

Section 26.2652-2(c) provides that if a reverse QTIP election is made with respect to a trust prior to December 27, 1995, and the GST exemption has been allocated to that trust, the transferor (or the transferor's executor) may elect to treat the trust as two separate trusts, one of which has a zero inclusion ratio by reason of the transferor's GST exemption previously allocated to the trust. The separate trust with the zero inclusion ratio consists of that fractional share of the value of the entire trust equal to the value of the nontax portion of the trust under § 26.2642-4(a). The reverse QTIP election

is treated as applying only to the trust with the zero inclusion ratio. An election under this section is made by attaching a statement to a copy of the return on which the reverse QTIP election was made under § 2652(a). The statement is to be filed before June 24, 1996.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose date is prescribed by a regulation (and not expressly provided by statute).

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Decedent's executor is granted an extension of time of 60 days from the date of this letter to make the election under § 26.2652-2(c) to treat the Marital Trust as two separate trusts, one of which has a zero inclusion ratio by reason of Decedent's GST exemption previously allocated to the Marital Trust. The reverse QTIP election will be treated as applying only to the trust with the zero inclusion ratio. The election should be made by completing the statement required in § 26.2652-2(c) and submitting the election, a copy of the return on which the reverse QTIP election was made under § 2652(a)(3), and a copy of this letter, to and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999.

With respect to the second ruling request, we note that, as provided above, \$e of Decedent's GST exemption remains unallocated after the filing of Decedent's Form 706. We further note that, under the facts provided, no direct skips occurred at the Decedent's death. As discussed above, after the Decedent's estate makes the election under § 26.2652-2(c) to treat Marital Trust as two separate trusts, one of the trusts will be exempt from GST tax in view of the estate's affirmative allocation of Decedent's GST exemption. The other trust will not be exempt, but will have a transferor other than Decedent for estate and GST tax purposes. As for Family Trust, although Family Trust

was funded with \$b, only \$d of Decedent's GST exemption was allocated thereto. Accordingly, after Decedent's executor properly makes the election under § 26.2652-2(c), \$f of Decedent's GST exemption (an amount less than \$e) will be automatically allocated to Family Trust pursuant to § 2632(c) (as in effect for the year in issue). Assuming the trusts are properly funded, the inclusion ratio for Family Trust will be zero.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Curtis G. Wilson
Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosure:
Copy for § 6110 purposes